UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

KELLY SERVICES, INC.,

And **Case 04-CA-171036**

T. JASON NOYE, an Individual

KELLY SERVICES, INC.'S REPLY TO THE CHARGING PARTY'S AND THE GENERAL COUNSEL'S OPPOSITION TO RESPONDENT'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

Respondent Kelly Services, Inc. ("Respondent" or "Kelly") hereby files this Reply Brief in Support of its Exceptions to the decision of the Administrative Law Judge Robert A. Giannasi ("ALJ").

INTRODUCTION[1]

This case concerns Kelly's Dispute Resolution and Mutual Agreement to Binding Arbitration ("Agreement"). The Agreement provides that employees who sign it will arbitrate their employment-related claims on an individual basis, thereby waiving participation in collective or class actions. (ALJD at 2:27-39.) The Agreement also contains a section explicitly stating that employees can file administrative charges, including charges with the NLRB. (ALJD at 2:40-3:12.) The ALJ found both of these sections of the Agreement to be unlawful. (ALJD at 6:20-30.)

[1] Throughout this Reply, references are made to the ALJ's Decision as "ALJD at ___," to the Counsel for the General Counsel's Answering Brief in Response to Respondent's Exceptions to the Administrative Law Judge's Decision as "GC at p. ___," and to the Brief of Charging Party T. Jason Noye in Opposition to Respondent Kelly Services, Inc.'s Exceptions to the Decision of the Administrative Law Judge as "CP at p. ___."

The contentions of the General Counsel ("GC") and the Charging Party ("CP") regarding Respondent's exceptions to both allegations are unpersuasive for multiple reasons. With respect to the collective/class action waiver provision, the GC and the CP disregard the overwhelming authority supporting Respondent's position that collective/class action waivers are lawful, and the fact that the Department of Justice recently filed briefs with the Supreme Court in support of Respondent's position. The GC and the CP also disregard the fact that the legality of these waivers is currently an issue pending review by the U.S. Supreme Court in three consolidated cases: *NLRB v. Murphy Oil USA, Inc.*, 808 F.3d 1013 (5th Cir. 2015), *cert granted*, S. Ct. No. 16-307 (Jan. 13, 2017); *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016), *cert granted*, S. Ct. No. 16-285 (Jan. 13, 2017); and *Morris v. Ernst & Young LLP*, 834 F.3d 975 (9th Cir. 2016), *cert granted*, S. Ct. No. 16-300 (Jan. 13, 2017) (referred to collectively herein as the "Consolidated Appeals"). The GC and the CP seek that the Board ignore this opposing case law and the pending Supreme Court review — all to haphazardly obtain a fast "resolution" in the instant case. (CP at p. 13; GC at pp. 4-6.)

With respect to the second issue, the GC and the CP erroneously contend that the section in the Agreement providing that charges may be filed with the NLRB is ambiguous because the language is not clear as to whether or not employees can file charges and because this same language does not explicitly state "unfair labor practices." (GC at pp. 9-10; CP at p. 9.) The Agreement clearly states that employees may file charges: "I also understand that I am not barred from filing an administrative charge with such governmental agencies as the National Labor Relations Board ("NLRB")." (ALJ at p. 2.) There is also no authority for requiring the term "unfair labor practices" to be included in the Agreement.

The GC and the CP also contend that the monetary remedy limitation in the Agreement is unlawful, but they fail to provide any authority opposing Respondent's Exceptions. (GC at pp. 12-14; CP at pp. 10-11.) Moreover, while the GC contends that the Board's enforcement of the Act is for the "Public Good," this contention has no bearing on whether or not the monetary remedy limitation is lawful. (GC at pp. 12-13.) Accordingly, Respondent respectfully requests that the Board find merit to Respondent's Exceptions to the Decision of the Administrative Law Judge and dismiss the Complaint in its entirety.

ARGUMENT

I. Despite The Fact That The Agreement's Class Action Waiver Will Be Decided by The Supreme Court, The GC And The CP Want The Board To Ignore The Posture Of The Consolidated Cases And Rush To Judgment

The opposition of the Charging Party and the GC to Respondent's Exceptions with respect to the collective/class action waiver are all based on existing Board law, which has been challenged, rejected by several Courts of Appeals, and the legality of which is currently an issue pending review by the U.S. Supreme Court in the Consolidated Cases. *See Murphy Oil USA, Inc.*, 808 F.3d at 1013; *Epic Sys. Corp.*, 823 F.3d at 1147; and *Ernst & Young LLP*, 834 F.3d at 975. Given this posture, Kelly will not respond to the GC's and the CP's opposition to Kelly's analysis as to why the Board is wrong in its interpretation of the rights set forth under the Act and in its attempt to trench on the Federal Arbitration Act ("FAA").

Rather, for purposes of its Reply, Respondent addresses the GC's and the CP's blatant attempt to ignore the current posture of this issue. The GC and the CP fail to address the substantial and compelling case law that has developed throughout the country on this issue. (*See generally* CP's and GC's Briefs.) Instead, the GC and the CP contend that Respondent's exceptions have no merit because the Board in *Murphy Oil* has found these type of agreements to be unlawful:

> Although true that the Supreme Court will soon consider "[w]hether the collective bargaining provisions of the National Labor Relations Act prohibit the enforcement under the Federal Arbitration Act of an agreement requiring an employee to arbitrate claims against an employer on an individual, rather than collective, basis," S. Ct. No. 16-300 (Jan. 13, 2017), the Board has already concluded that such agreements violate the NLRA and that decision is binding until any reversal.

(CP at p. 13; *see also* GC at p. 4.)

The reasoning of the CP and the GC – that *Murphy Oil* is dispositive and that it is irrelevant that this issue is before the Supreme Court – shows once again the GC's disregard for its powers and its standing vis-a-vis Circuit Courts and the Supreme Court. Even a simple review of the NLRB's website makes clear that the Board cannot compel enforcement of own orders — the Board must seek enforcement in the Circuit Courts. NLRB, *www.nlrb.gov/what-we -do/enforce-orders.* Similarly, the Supreme Court, as should be obvious, has final review of the Board's decisions. Given that the Supreme Court is currently reviewing the legality of such agreements, the Supreme Court – and not the Board – will determine the enforceability of arbitration agreements containing waivers of class/collective litigation under the National Labor Relations Act ("NLRA" or "Act"). Accordingly, the GC's and the CP's position that the Board should simply resort to its position in *Murphy Oil* makes no sense. The reality is that the NLRB's decision will not be enforced if it runs afoul of the Supreme Court's decision and the pursuit to rush to issue a haphazard decision in this case will be a complete waste of judicial resources. Accordingly, it is Respondent's position that this case should be stayed pending the Supreme Court's decision.

II. The Opposition Of The GC And The CP To Respondent's Exceptions To The Alleged Restriction In the Agreement On Filing Charges Have No Merit

A. There Is No Ambiguity In The Agreement's Language

The GC and the CP oppose the Respondent's exceptions by contending that the Agreement is ambiguous as to whether or not employees are allowed to file charges because: (1) the language in the Agreement does not clearly state that employees can file charges (GC at pp. 8-9; CP at p. 8); and (2) the section addressing the exclusions does not use the term "unfair labor practices." (GC at p. 9; GC at p. 10.) Neither contention has merit.

There is nothing unclear about the specific exclusions. While the second paragraph of the Agreement provides the claims that are subject to the Agreement, the third paragraph, located on the first page of the Agreement, commences with a bold caption that states **"Exclusions from Agreement"** and also states, "I also understand that I am not barred from filing an administrative charge with such governmental agencies as the National Labor Relations Board ("NLRB")." (ALJD at 3:5-11.) The exclusionary language explicitly explains that charges under the "National Labor Relations Board" and "NLRB" are excluded. (*Id.*) Thus, there is no ambiguity. *See also ISS Facility Services, Inc.*, 363 NLRB No. 160, slip op. at 7 (Apr. 7, 2016) (Chairman Miscimarra criticizing the majority for "selectively" focusing on language that broadly stated that the agreement applied to "any claims," while ignoring the language that explicitly allowed for the filing of charges, which made it clear that employees were allowed file charges with the NLRB.)

Nevertheless, the GC and the CP contend that "rank and file" employees cannot be expected to examine this Agreement from a legal standpoint and that as written, the language is unclear. (CP at p. 8; GC at p. 9.) Yet, nothing can be clearer than: "I also understand that I am not barred from filing an administrative charge with such governmental agencies as the National Labor Relations Board ("NLRB")." (ALJD at 2:40-3:12.) There is no need to be a lawyer to understand what this one sentence states. In fact, in *Solarcity Corp.*, 363 NLRB No. 83 (Dec.

22, 2015), Chairman Miscimarra explained the illogic of the position that the CP and GC are now taking here:

> Even though the Agreements expressly state employees retain the right to "file a charge or complaint with the National Labor Relations Board," my colleagues make a three-stage argument that the class-action waiver in the Agreements creates "an inherent ambiguity" because (i) the Agreements state that employees "waive any right to pursue or participate in any dispute on behalf of … any class, collective or representative action, except to the extent such waiver is expressly prohibited by Law," (ii) an NLRB charge sometimes "purports to speak to a group or collective concern," and (iii) the Agreements' class-action waiver would interfere with the filing of charges that speak to group or collective concerns is "expressly prohibited by the law." The problem with this argument is its false, circular premise that the Agreement's class-action waiver can be construed to interfere with the filing of Board charges, despite other language in the Agreements that specifically addressed Board charge-filing and contradicts such a construction. As noted previously, the Agreements categorically *permit* the filing of Board charges--all Board charges, including those that "purport[]to speak to a group or collective concern." Here as well, specialized legal knowledge is not required to understand what the Agreements mean. Rather, only lawyers could argue for the interpretation reflected in my colleagues' three-stage "inherent ambiguity" analysis.

Id. at slip. op. 10. Hence, there is nothing unclear about the exclusionary language in the Agreement.

Further, both the GC and the CP also contend that the exclusionary language in the Agreement is ambiguous because it does not "explicitly mention unfair labor practice claims." (GC at p. 10; *see also* CP at p. 9.) This contention is without a basis. The NLRA refers to the filing of "charges" not "unfair labor practices." *See, e.g.*, 29 U.S.C. § 153(d); 29 U.S.C. § 158(a)(4). The NLRB's Form NLRB-501 is titled "Charge Against Employer," not "Unfair Labor Practice Against Employer." *See* NLRB, *https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-3040/nlrbform501.pdf.* In addition, if an employee wants to file a charge against an employer through the NLRB's website, the employee has to go to the "E-File Charge/Petition" section of the website. *See* NLRB, *https://apps.nlrb.gov/chargeandpetition/#/.* Given the terminology used by the NLRB and in the

NLRA, this contention is illogical. Neither the GC nor the CP provided any legal support for their position. While the CP cited to *Ralph's Grocery Co.*, 363 NLRB No. 128 (Feb. 23, 2016), there is nothing in the case that states that an employer must use "unfair labor practice" when describing the types of claims that are excluded from the mandatory arbitration provisions. The GC did not cite to any authority. Accordingly, there is no merit to this allegation.

B. The Limitations On Back Pay Do Not Violate The Act

The GC and the CP also erroneously contend that due to the language in the Agreement that states that employees cannot obtain back pay through the filing of charges, the agreement is unlawful because it "discourages" employees from filing charges as they "would believe it is futile to file a charge with the Board." (CP at p. 11; GC at p. 11.) The GC cites to two cases for support; however, neither case addresses this issue. (GC at p. 11.) The first case, *Professional Janitorial Service of Houston*, 363 NLRB No. 35, slip op. at 3 (2016), does not address anything related to back pay or monetary awards. Rather, in that case the Board analyzed whether or not an arbitration agreement that stated that "non-waivable statutory claims, which may include . . . the National Labor Relations Board," was unlawful because it was not clear what constituted "non-waivable statutory claims." *Id.* at slip op. 3. Equally as irrelevant is *Bill's Electric*, 350 NLRB 292 (2007), the second case cited by the GC. There, the issue was whether or not an employment application was lawful where it stated that the employee could file NLRB charges, but such charges would have to be stayed pending the mandatory arbitration process and that if the charge proceedings were not stayed, the employee would have to pay the litigation costs incurred in compelling compliance with the agreement's process. *Id.* at 296.

Furthermore, separate from the fact that the GC's and the CP's position is unsupported by any cited case law, their argument fails on its face. The CP and the GC contend that non-lawyer

employees would read the Agreement's language, know whether or not they are entitled to monetary remedies based on their allegations, and based on their analysis as to whether or not they would be entitled to monetary remedies, decide whether or not to file charges. This runs afoul of the very same case law that both the CP and the GC cite with respect to employees not being able to analyze the Agreement as lawyers: "rank-and-file employee . . . cannot be expected to have the same expertise [as lawyers] to examine company rules from a legal standpoint." (GC at p. 9; CP at p. 8.) (citations omitted.) Here, the GC's and the CP's position assumes that employees would use legal expertise when reading the Agreement and be discouraged from filing a charge based on their understanding that no monetary remedies would be provided through the filing of a charge.

Finally, the GC contends that the limitation on monetary relief through the NLRB's processes is unlawful because:

> The Arbitration Agreement is meant to take care of claims that relate to employee's employment—"including, but not limited to, any claim for breach of contract, unpaid wages, wrongful termination, unfair competition, and for violation of laws forbidding discrimination, harassment, and retaliation on the basis of race, color, religion, gender, age, national origin, disability, and any other protected status." . . . . These are the kinds of claims that if successful, there is likelihood of monetary relief. These also include the types of cases that would result in backpay remedy if an employee was successful in a Board proceeding. Respondent knows this.

(GC at pp. 13-14.) This is not correct. All these listed categories concern violations that do not fall under the NLRB's purview. Notably, "unfair labor practices" is not included in that list. Thus, while the listed type of claims may result in monetary remedies, the NLRB has no authority over these claims.

Accordingly, neither the GC's nor the CP's contentions that reasonable employees would be discouraged from filing charges because of the monetary limitations in the Agreement have any merit.

C. The GC's "Public Good" Arguments Are Not Dispositive

Finally, the GC asserts that the limitation on monetary remedies is unlawful because it is a limitation on the Board in that the Board's "enforcement of the Act is a public, not individual, concern." (GC at p. 13.) This contention is not relevant with respect to whether or not the limitation on monetary remedies is unlawful. Employees are allowed to enter into contractual agreements with their employers that may limit their ability to proceed through the NLRB's processes. *See 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 258 (2009). In *14 Penn Plaza*, the Supreme Court held that a collective bargaining agreement between a union and an employer could lawfully provide for the arbitration of claims arising out of a statute. *Id.* at 258 ("having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue"). However, the Supreme Court carefully noted that: "**[n]othing in the law suggest a distinction between the status of arbitration agreements signed by an individual employee and those agreed to by a union representative.**" *Id.* at 258 (emphasis added). Therefore, the Supreme Court has made clear that individuals can enter into contracts through which they can agree to arbitrate statutory claims and obtain any warranted monetary relief through arbitration. Hence, it does not follow that an employer would somehow violate the Act by entering into the very agreements the Supreme Court has ruled parties can enter into to redress their statutory claims.

Moreover, the Board's powers are limited by employees' individual choices. For example, though the enforcement of the Act may be perceived as "a public, not individual, concern," the Board cannot *sua sponte* investigate issues and file its own charges. *See* 29 U.S.C. § 153(b); 29 U.S.C. § 153(d). The Board is limited to investigating and remedying only those unfair labor practices that individuals file with the Regions. *See id.* Moreover, the charging

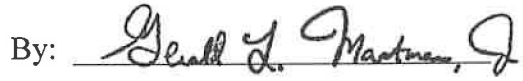
parties have the right to solicit withdrawals of their charges. *NLRB Case Handling Manual*, Part 1, Unfair Labor Practice Proceedings, § 10130.2 (February 2017). Regional offices allow charging parties to withdraw their charges for various reasons, including in response to the parties reaching non-Board settlements. *NLRB Case Handling Manual*, Part 1, Unfair Labor Practice Proceedings, § 10140 (February 2017) ("In addition to Board settlements, unfair labor practice charges may be resolved through *a specific agreement between the parties*, including grievance settlements, or as a result of unilateral action taken by the charged party which satisfies the CP. Non-Board adjustments result in the withdrawal of the charge or, in limited circumstances, dismissal.") The withdrawal of a charge effectively ends the investigation and potential enforcement of the Act. Thus, while the Board's enforcement of the Act may be a public concern, such a "concern" does not provide any basis for finding the Agreement to be unlawful.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that the Board find merit to Respondent's Exceptions to the Decision of the Administrative Law Judge and dismiss the Complaint in its entirety.

Respectfully submitted,

KELLY SERVICES, INC.

By: 

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of this Reply Brief to be served upon the Board via electronic filing and the following counsel of record via email on this 18th day of July, 2017:

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